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January

1. The first of the month was a fine day, with a light breeze from the north and a clear sky. The temperature was in the 40's.

2. On the 2nd, a heavy fog came in from the south, and the temperature fell to the 30's. The fog cleared away in the afternoon.

3. On the 3rd, the weather was clear and bright, with a strong breeze from the west. The temperature was in the 50's.

4. On the 4th, a heavy rain fell, and the temperature was in the 40's. The rain continued until the evening.

5. On the 5th, the weather was clear and bright, with a light breeze from the north. The temperature was in the 50's.

February

1. The first of the month was a fine day, with a light breeze from the north and a clear sky. The temperature was in the 40's.

2. On the 2nd, a heavy fog came in from the south, and the temperature fell to the 30's. The fog cleared away in the afternoon.

3. On the 3rd, the weather was clear and bright, with a strong breeze from the west. The temperature was in the 50's.

4. On the 4th, a heavy rain fell, and the temperature was in the 40's. The rain continued until the evening.

5. On the 5th, the weather was clear and bright, with a light breeze from the north. The temperature was in the 50's.

March

1. The first of the month was a fine day, with a light breeze from the north and a clear sky. The temperature was in the 40's.

2. On the 2nd, a heavy fog came in from the south, and the temperature fell to the 30's. The fog cleared away in the afternoon.

3. On the 3rd, the weather was clear and bright, with a strong breeze from the west. The temperature was in the 50's.

4. On the 4th, a heavy rain fell, and the temperature was in the 40's. The rain continued until the evening.

5. On the 5th, the weather was clear and bright, with a light breeze from the north. The temperature was in the 50's.

April

1. The first of the month was a fine day, with a light breeze from the north and a clear sky. The temperature was in the 40's.

2. On the 2nd, a heavy fog came in from the south, and the temperature fell to the 30's. The fog cleared away in the afternoon.

3. On the 3rd, the weather was clear and bright, with a strong breeze from the west. The temperature was in the 50's.

4. On the 4th, a heavy rain fell, and the temperature was in the 40's. The rain continued until the evening.

5. On the 5th, the weather was clear and bright, with a light breeze from the north. The temperature was in the 50's.

IN THE  
**Supreme Court of the United States**

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No.

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TEXAS STATE LIFE INSURANCE COMPANY, *et al*,  
*Petitioners,*

*vs.*

SEBE J. HOUGHTON, JR.,  
*Respondent*

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*On Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.*

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**PETITION**

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*To the Honorable Fred M. Vinson, Chief Justice, and the  
Associate Justices, of the Supreme Court  
of the United States.*

Your Respondents respectfully show:

**1. The Issue**

There is here presented the single clear cut issue on whether or not a Veteran returning from the Army is entitled to be restored to his former position, or one of like status and pay, when such position is the presidency of a corporation and elected, subject to change by the stockholders of said corporation, from year to year.

The question is whether or not in a proceeding under subsection (e) of Section 308, Title 50, Appendix, U. S. C. A., an elective position by the stockholders of a corporation is a temporary one.

The further question is whether or not when the status of a corporation has so changed to the extent that it becomes unreasonable for the reinstatement of such an employee that he is still entitled to such employment for a period of one year under the above named statute.

## **2. The Statutory Law**

The statute involved is subsection (e) of Section 308, Title 50, Appendix, U. S. C. A.

## **3. The Decisions in the Courts Below**

The opinion of the District Court for the Northern District of Texas is reported in 68 F (s) 21.

The opinion of the Circuit Court of Appeals is reported in 166 F (2nd) 848.

The order denying motion for re-hearing was entered on April 15, 1948.

## **4. The Procedure**

Very briefly the pertinent proceedings were as follows:

The petitioner filed his petition under subsection (e) of Section 308, Title 50, Appendix, U. S. C. A.

The defendants filed their answer alleging the defendant to be an insurance company duly organized and operating under the laws of the State of Texas; and further alleging that the position was a temporary one and that the status of the company had so changed as to render the re-employment of the petitioner, Houghton, unreasonable.

Judgment of the District Court for the defendants was entered on the 3rd day of October, 1946.

Petitioner appealed to the Circuit Court of Appeals and judgment reversing the judgment of the District Court was entered on March 1, 1948.

A motion for re-hearing was denied on April 15, 1948.

#### **5. Statement of the Basis of the Jurisdiction of this Court**

The jurisdiction of this court is conferred by 28 U. S. C. A. 347 (a).

The judgment of the court below was entered on March 1, 1948 and became final on April 15, 1948, when the petition for re-hearing was denied. This petition for certiorari is filed within three months thereafter.

#### **6. The Questions Presented**

The petition for a writ of certiorari presents the following questions:

1.

Is the office of president of a state corporation where same is elective from year to year a temporary one?

2.

Has the court the right to decree that the office of president or directors of a state corporation is one that the court has jurisdiction over?

3.

Is an elective position of a corporation a temporary one?

4.

Is the payment of a year's salary in an elective position in compliance with subsection (e) of Section 308, Title 50, Appendix, U. S. C. A.?

**7. Reasons For Allowance of The Writ of Certiorari  
Prayed For**

1.

An important question is involved as to the meaning of an Act of Congress.

2.

There is conflict of decisions among the federal courts.

3.

The important question of whether or not the courts have power to dictate who shall be the officers of a state corporation is involved.

4.

There is involved the question whether, when the status of a corporation has so changed that the restoration of an employee is unreasonable, the court has a right to force a state corporation to restore an employee.

Wherefore, we pray that a Writ of Certiorari issue to the Appellate Court below directing it to certify and send to this court a transcript of the record and the proceedings thereon so that this cause may be determined by this court and for all other proper relief.

ROSS CARLTON,  
*Dallas, Texas*

O. M. STREET,  
*Dallas, Texas*

*Counsel for Petitioners*

Dallas, Texas,  
June 28, 1948.

IN THE  
**Supreme Court of the United States**

No.

TEXAS STATE LIFE INSURANCE COMPANY, *et al*,  
*Petitioners,*

*vs.*

SEBE J. HOUGHTON, JR.,  
*Respondent*

*On Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.*

**BRIEF**

**IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

The Subject Index precedes the Petition for Certiorari.  
All emphasis is supplied unless otherwise stated.

1.

**The Report Of The Decision Below**

The opinion of the District Court for the Northern District of Texas is reported in 68 F (s) 21.

The opinion of the Circuit Court of Appeals is reported in 166 F (2nd) 848.

The order denying motion for re-hearing was entered on April 15, 1948.

## 2.

The basis for the jurisdiction of this court has been stated at page 3 of this petition for Certiorari.

## 3.

**STATEMENT OF THE CASE**

The petitioner, Houghton, seeks to be re-instated as president of Texas State Life Insurance Company, a State Corporation, under subsection (e) of Section 308, Title 50, Appendix, U. S. C. A.

The petitioners here seek to avoid such restoration on the grounds that his position was a temporary one and that the status of the corporation has so changed that such restoration is unreasonable.

**4. A Fuller Statement**

The petitioner, Houghton, filed his petition in the District Court alleging for jurisdiction subsection (e) of Section 308, Title 50, Appendix, U. S. C. A., that on April 23, 1942 he was director and president of petitioner corporation at a salary of \$4800.00 per year; that on April 23, 1942 he was inducted into the United States Army; that on December 15, 1945 he was on terminal leave from the United States Army and that he is entitled to be restored to the position that he held when in the employ of the petitioner corporation at the time he entered the United States Army, or to a position of like status, seniority and pay.



The petitioner corporation alleged and proved that it was a corporation life insurance company, organized and operating under the laws of the State of Texas, with its principal office and place of business in Dallas, Dallas County, Texas; that its stock is owned by various people throughout the State of Texas as well as other states. As approved by the laws of the State of Texas, the stockholders elect annually a Board of Directors who in turn elect from their number, its officers, among which is its president. That at a called meeting of its Board of Directors on April 15, 1946, said Board, by resolution duly made and adopted, refused to restore the plaintiff, Houghton; that said reasons for refusing the restoration were that the position of the president was an elective one from year to year as provided by its By-Laws and that the status of the corporation has so changed that the restoration would be unreasonable and impossible.

### 5. Specification of Errors

#### 1.

The payment of a year's salary is not in compliance with subsection (c) of Section 308, Title 50, Appendix, U. S. C. A. The court below refused to take into consideration the proposition that an elective position in a state corporation is a temporary one.

#### 3.

The court below failed to pass upon the proposition that an elective position in a state corporation is a temporary one.

#### 4.

The court below refused to consider the proposition that the position of an officer of a corporation where elected from year to year is a temporary position.

## 6. ARGUMENT

The appellee is a life insurance company, organized and incorporated under the laws of the State of Texas.

The Revised Civil Statutes provide that the stockholders of an insurance corporation shall elect its directors and that such directors shall elect its officers. (R. C. S., Articles 4708 and 4711.) The by-laws of said corporation provide that the officers of said corporation shall be elected annually. The appellant in this case was elected president and director at its March meeting in 1942. He was called to active duty during the month of April, 1942, and he continued in this position until the next annual meeting of the stockholders, at which time he was not reelected as director, neither was he reelected president.

The testimony shows that the appellant was entirely out of harmony with the directors and stockholders of this company at the time he left to enter the armed services.

In the case of *McClayton v. W. B. Cassell Company*, 66 Fed. Supp. 165, Judge Chesnut of the District Court of Maryland passed on a very similar situation in which appellant McClayton had had a history of employment similar to appellant herein. Judge Chesnut, in the *McClayton* case said:

"First vice-president in active charge of business corporation whose duties were prescribed by by-laws and whose salary was fixed by directors and who had no contract of employment, was not an 'employee' of corporation within statutes providing for reemployment of discharged veterans.

"First vice president in charge of business corporation, continued to hold his position at least seven months after entering upon active duty in naval reserve and was removed from office because of activities prejudicial and disloyal to corporation and was not entitled to restoration to office under statutes providing for reemployment of discharged veterans."

Judge Chesnut further said:

"The respondent contends that the position which the petitioner held in December, 1943 was only a *temporary* one in that he had previously been elected as first vice-president of the corporation for a limited period only, that is to say, until the next annual stockholders' meeting to elect new directors who in turn would select for the succeeding years the officers of the corporation. More specifically, it is pointed out that under the Maryland corporate law annual stockholders' meetings are to be held, at which time the directors are elected to serve for the ensuing year. In turn the new Board of Directors elects its own officers. Therefore, it is said that the petitioner was elected to his position as first vice-president of the corporation for only a limited period of one year, and therefore held only a temporary position."

The position in the instant case to which respondent seeks restoration is not that of simple reemployment. It is an elective position. A position which must be filled through such election by the requirements of the provisions of the charter of the corporation and the insurance laws of the State of Texas.

The case of *Trusted Funds, Inc. v. Dacey*, 66 F (s) 321.

"One further matter needs to be mentioned, since the case will go back for a new trial. As previously stated there was some evidence that Dacey, when he saw Griffith in June, 1945, insisted not only upon reemployment in the former position he had held under the expired contract, but also, upon being reinstated as director and vice-president. There might be some question whether an elective officer in a corporation, such as the vice-president, has a position 'in the employ' of the corporation, within the meaning of Sec. 8. See *McClayton v. W. B. Cassell Co.*, supra, 66 F. Supp. at pages 171, 172; *Houghton v. Texas State Life Ins. Co.*, D. C. N. D. Texas 1946, 68 F. Supp. 21. We need not decide this, inasmuch as Dacey has not cross-appealed from the judgment because of its not having ordered his reinstatement as vice-president. But certainly a

director would not in the ordinary usage be regarded as 'in the employ' of the corporation, and we believe it to be clear that a director, as such, is not given reemployment rights under the Act. The testimony just referred to related to an alleged demand by Dacey in preliminary negotiations before he had been released from the Army. Whether in his formal application for reemployment after his discharge, Dacey maintained his insistence upon being reinstated as a director, we do not know. If he did so, a question would be presented as to the legal effect on his statutory rights of having demanded more than he was entitled to, assuming for present purposes he was otherwise entitled to something."

Petitioners contend that the circumstances of respondent corporation have materially changed during respondent's absence and that it would be unreasonable to require said corporation to reemploy respondent either in the positions formerly held by him or in one of like seniority, status and pay.

Petitioners further contend that the position held by the respondent at the time of his entering military service was a temporary position and that he was not an "employee" within the meaning under the Selective Service Statutes.

ROSS CARLTON,  
O. M. STREET,

*Attorneys for Petitioners*

### CONCLUSIONS AND PRAYER

For the reasons given the petitioners pray for a Writ of Certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,  
ROSS CARLTON,  
*Dallas, Texas*

O. M. STREET,  
*Dallas, Texas*

*Counsel for the Petitioners,  
Texas State Life Insurance  
Company, et al*

June 28, 1948

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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1948

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No. 146

TEXAS STATE LIFE INSURANCE COMPANY, ET AL.,  
PETITIONERS

v.

SEBE J. HOUGHTON, JR.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the District Court of the United States for the Northern District of Texas (R. 50-55) is reported at 68 F. Supp. 21. The opinions in the United States Circuit Court of Appeals for the Fifth Circuit (R. 58-62) are reported at 166 F. 2d 848.

## **JURISDICTION**

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was en-

tered on March 1, 1948 (R. 62). A petition for rehearing was denied on April 15, 1948 (R. 66). The petition for a writ of certiorari was filed on July 9, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code as amended (now 28 U. S. C. 1254).

#### QUESTIONS PRESENTED

1. Whether a person who is director and president of a corporation, subject to annual elections, but who performs special duties of an executive and managerial character and receives special compensation for his services, may occupy "a position, other than a temporary position, in the employ of any employer" within the meaning of Section 8(b) of the Selective Training and Service Act.

2. Whether under the circumstances of the particular case it was impossible or unreasonable to restore respondent to a position with status and pay comparable to the position he occupied when he was ordered into military service.

#### STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 308) provide as follows:

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes



his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. \* \* \*

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

\* \* \* \* \*

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

\* \* \* \* \*

#### STATEMENT

Respondent brought this suit under Section 8(e) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 308(e)) for restoration to the position he held in petitioners' employ at

the time he entered military service, or one of like seniority, status, and pay, and for compensation for damages resulting from petitioners' refusal (R. 6). Relief was denied in the district court (R. 13), but this judgment was reversed on appeal (R. 62).

Petitioners are a Texas insurance corporation doing business in Texas and the directors of the corporation (R. 3). Respondent was a director and president of the corporation at an annual salary of \$4,800 when he entered military service on April 23, 1942 (R. 50). Under applicable Texas law, an insurance company is required to be managed by not fewer than seven directors, all of whom shall be stockholders of the company, and the directors are required to elect from among themselves the president and such other officials as the bylaws may require (R. 50, 60). After respondent went into military service, the vice president acted as president until the next stockholders' meeting when he was elected president (R. 52). Respondent satisfactorily completed his period of active duty on December 15, 1945, and on March 11, 1946, applied for restoration to the positions he had previously occupied or to a position of like seniority, status, and pay, which was refused (R. 5, 8).

Petitioners contended that the positions, being annually elective offices, were not "position[s], other than a temporary position in the employ of any employer" within the meaning of Section

8(b) (R. 8), and further that it was impossible or unreasonable to restore respondent because the company had been reorganized during his absence, its capital stock increased, a new and different type of policy was being offered, and a change in the conduct of the business, to which respondent had objected, was now in effect (R. 50-51). It was also asserted that respondent, while in office, had engaged in numerous controversies with the state board of insurance commissioners to the detriment of the company, and that restoration of respondent would result in similar controversies and serious losses to the company, and that he was not qualified or able to perform the duties of his previous position because he disagreed with the present method of operation of the business and was not qualified to be restored as president since he had not been elected a director of the corporation (R. 51).

Despite respondent's controversies with the state insurance authorities and the differences of opinion between him and the board of directors, he had been reelected president shortly before his call to military service (R. 29, 52). He had been a founder of petitioner corporation and its predecessor and at the time he began service in the Army he had held the position of president or executive vice president of the company for more than nine years (R. 20).

Without passing upon respondent's views with respect to the operation of the company or his disagreement with others in this connection, the

district court denied relief on the ground that it would be "unreasonable" within the meaning of the Act to require restoration to a position required to be elective under state insurance laws (R. 54). The circuit court of appeals reversed and remanded, one judge dissenting, and held that although the position of director or president of a corporation alone, without special duties or compensation, would probably not be a position to which restoration was required, respondent was entitled to be restored since he "had executive and managerial duties, and was paid a salary of \$4,800 per year" (R. 60). The court further ruled that respondent's employment was not temporary, although it was limited in time to one year and was conditioned upon reelection each year (R. 60). The court reasoned that no "impossibility" was involved since it would have been possible for the respondent to have been elected a director and president and his views on policies were subject to the control of the board of directors (R. 61). In any event, it was held, he could have been denied the presidency and have been given some other position with like status and pay (R. 61). Since the position occupied was limited to one year and the year had already elapsed, the court ruled that respondent should recover a year's salary if no better total defense were advanced in further proceedings (R. 61).

## ARGUMENT

The decision of the court below does not present a conflict and does not raise any question of general importance in the administration of the Selective Training and Service Act. Although the question whether an officer or director of a corporation is entitled to restoration has arisen on a few occasions, the decisions have consistently recognized that each case must rest on its particular facts. *Trusteed Funds v. Dacey*, 160 F. 2d 413 (C.C.A. 1); *John S. Doane Co. v. Martin*, 164 F. 2d 537 (C.C.A. 1); *Van Doren v. Van Doren Laundry Service*, 162 F. 2d 1007 (C.C.A. 3); *Campbell v. Radio-Television Institute, Inc.*, 12 Labor Cases ¶63-682, decided March 31, 1947 (S.D.N.Y., not officially reported); *McClayton v. W. B. Cassell Company*, 66 F. Supp. 165 (D. Md.). These decisions agree that restoration to an elective position as officer or director of a corporation is probably not required, but make clear that the right of a particular individual to reinstatement will depend upon his relationship to the company and the duties he is expected or required to perform. "We do not think that because the veteran held an elective office in addition to his other work he should therefore be deprived of all of his reemployment rights." *John S. Doane Co. v. Martin*, *supra*, at p. 541. It is also clear that a person will not be deemed to hold a temporary position merely because his office has a fixed term. The character of the position

will depend upon the length of an employee's association with the firm and other factors. *Trusted Funds v. Dacey, supra*; *Van Doren v. Van Doren Laundry Service, supra*; *McClayton v. W. B. Cassell Co., supra*.

The court below gave full effect to the foregoing principles. It assumed that "being merely a director of a corporation, or its president without special duties or compensation, would probably not be" a position to which restoration was required (R. 60). Respondent's right to reinstatement was based specifically upon his "executive and managerial duties" and the fact that he "was paid a salary of \$4,800 per year" (R. 60). The determination that respondent's position was not temporary is clearly supported by his more than nine years of service as well as by his participation in the founding of the company (R. 20, 60). The charges with respect to respondent's conduct in office were not finally disposed of by either of the lower courts and their effect on unreasonableness or impossibility of reemployment should not be decided for the first time by this Court.<sup>1</sup> The two decisions from which petitioners quote, read in their entirety, are in accord with the principles referred to above and furnish no support for petitioners' suggestion of a conflict.

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<sup>1</sup> As pointed out previously, the judgment below remanded the cause for further proceedings (R. 61).

## CONCLUSION

Since there is no conflict of decisions and no question of general importance is involved, it is respectfully submitted that the petition for a writ of certiorari should be denied.

✓ PHILIP B. PERLMAN,

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AUGUST 1948.